87-1275

No. 87-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC.
and EDWARD C. RUBIN,

Appellants,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

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January 29, 1988

Questions Presented By the Appeal

Appellant purchased and renovated two adjacent dilapidated houses in New York City in 1982 and 1983. He did so in reliance upon the City's "J-51 tax exemption and abatement program," which, to induce such renovations, promised any party commencing such a renovation an as-of-right tax abatement and exemption in a fixed amount relating to the cost of the renovation. Entitlement to the benefits under the program vested at the date the renovation was commenced.

After Appellant commenced (and substantially completed) the renovation, the J-51 program was retroactively amended to deny benefits to the class of renovations that had been its first-stated goal throughout the period of Appellant's reliance.

1. Does the Due Process Clause permit the retroactive repeal of a tax inducement program?

2. May an amendment to an affirmative tax inducement statute be retroactively applied to a taxpayer who had been induced to act by it and had already satisfied the requirements for entitlement?

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IN THE

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No. 87-

REPLAN DEVELOPMENT, INC. and EDWARD C. RUBIN,

Appellants,

v.

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

JURISDICTIONAL STATEMENT

Appellants Replan Development, Inc. and Edward C. Rubin ("Appellant") appeal the judgment of the Court of Appeals of the State of New York entered on November 19, 1987.

Opinions Below [1]

The opinion of the Court of Appeals of the State of New York, rendered on November 19, 1987, is reported at 70 N.Y.2d 451 (1987) (A-1). The Order of the Appellate Division is reported at 125 A.D.2d 1014 (1st Dep't 1986) (A-7). The Decision and Order of the Supreme Court of the State of New York is not reported (A-9).

[1] The opinions below are reproduced in the appendix hereto ("A- ").

Grounds for Jurisdiction

This appeal is from the judgment of the New York Court of Appeals entered on November 19, 1987. That decision affirmed the constitutionality of the retroactive repeal of a tax inducement statute. This Court's jurisdiction is invoked under 28 U.S.C. § 1257. A Notice of Appeal was filed in the New York Court of Appeals on January 27, 1988.

Constitutional Provisions and Statutes Involved

The Fifth and Fourteenth Amendments to the Constitution of the United States, § 489 of the New York Real Property Tax Law, § J51-2.5 (now § 11-243) of the Administrative Code of the City of New York and regulations thereunder, Local Law No. 77 and the June 21, 1983 Amendment to Senate Bill No. 1373-B are set forth in the appendix to this Jurisdictional Statement.

Statement of the Case

Since the 1950's, the State of New York has permitted certain categories of municipalities to enact property tax benefit programs to induce renovation of substandard housing. The City of New York has sponsored the "J-51 tax abatement and exemption program" throughout this period. As the Court of Appeals noted in its decision below, the purpose of the "J-51 program was . . . to encourage renovation and development of class B multiple dwellings [*i.e.*, single room occupancy buildings] in order to increase the supply of class A residential housing." A-3.

Entitlement to the tax benefits is as-of-right. The right to the benefits provided under the local statute is triggered by "commencement" of the renovation, defined as issuance

of the building permit, provided that the administrative application is filed within 48 months of completion. The amount of benefits is determined by the amount spent on the renovation. The benefits are received in the form of tax abatements and exemptions over a period of time, typically 8 to 12 years.

The program has been re-enacted in amended form by the state and by the City of New York at varying times, but legislative changes in benefit levels and coverage do not affect prior entitlements.

The state enabling legislation allowing municipalities to "adopt or amend" the local tax abatement ordinances expired in June 1982, but New York City's J-51 program for new renovations by its terms continued in effect until December 31, 1984. A-2, 44. The expiration of the state enabling statute prevented the City from adopting new or amending old ordinances, but did not effect the continuation of the City's program, and the City's Corporation Counsel gave the opinion and made numerous public announcements that new renovations would continue to "automatically" qualify for J-51 benefits. *E.g.*:

> "[I]t's crystal clear that . . . what expired on that date [June 1, 1982] was only the City Council's power to amend the J-51 program . . . [T]he program automatically lasts until October 31, 1984." (*New York Times*, July 2, 1982)

Appellant, an architect and civic leader working on his first development project, purchased two adjoining derelict houses in the Chelsea Historic District in New York City in 1982 for $540,000. The houses, which were bricked-up and sealed, had been vacant since the prior year. After applying and receiving approval for the design of the renovation from New York City's Landmarks Preservation Commission, Appellant received a building permit on April

6, 1983, and commenced renovation immediately thereafter. The bulk of the renovation was completed by June 30, 1983.

Appellant would not have purchased the derelict houses but for the significant inducement, amounting to over $200,000 on this small project, of the City's J-51 tax inducement program.

On June 30, 1983, three months after Appellant had commenced the renovation and thereby automatically became entitled to its as-of-right benefits, the State of New York amended its enabling legislation. The amendments retroactively denied benefits to the class of renovations that had previously been the principal goal of the program—*i.e.*, conversion of Class B to Class A multiple dwellings.[2] This stark about-face reflected legislative concern over the loss of single room occupancy dwellings, and the retroactivity reflected concern over reported incidents in which landlords had harassed single room occupancy tenants in order to vacate buildings.[3]

Appellant's renovation, which fit squarely within the first-stated purpose of the program, raised none of the legislative concerns. As the court below noted, Appellant's buildings had been abandoned and vacant long before the retroactive date, and it is uncontroverted that by commencing his renovation on April 6, 1983, Appellant satisfied the existing

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[2] On November 7, 1983, the change was incorporated into the Administrative Code of the City of New York, and also applied retroactively to July 1, 1982.

[3] It is unclear how retroactivity would prevent the loss of single room occupancy units that had already been converted. Similarly, it is unclear why the City could not punish illegal acts by landlords without reneging on premises to law-abiding citizens whom the City actively encouraged and induced to undertake the precise renovations at issue.

requirements for entitlement to the stated benefits under the City's J-51 program. The City nonetheless rejected Appellant's timely application because of the retroactive preclusion of benefits to conversion of Class B to Class A multiple dwellings. A-15.

The Decision of the Court Below

The New York Court of Appeals concluded that the retroactive repeal of the J-51 program as applied to Appellant did not violate due process.

The court below interpreted decisions of this Court to draw a formalistic distinction between the lawful retroactivity of income and property taxes, on the one hand, and unlawful retroactivity of gift taxes, on the other. *See* A-4. The stated logic was that, in the case of property and income taxes, the "taxpayer received some economic benefit from the conduct aside the tax benefit" (A-4), *i.e.*, if the conduct is economically motivated, constitutional concerns are limited to such general considerations as the length of the retroactive period. In so holding, the Court of Appeals did not accept that the serious constitutional issues raised by retroactive gift taxes turned on the effect such a tax might have had on the taxpayer's behavior, not whether the tax was a property tax or a gift tax. Nor did the Court of Appeals recognize that changes to tax inducement statutes have a far more powerful, and purposeful, effect on taxpayer behavior than changes to gift taxes.

The court concluded that "property taxes and benefit assessments of real estate have been distinguished from the unfavored retroactivity of 'other types of taxes' " (A-4) and held that no special constitutional issues were implicated. The court refused to accept that the critical constitutional issue turned upon the affirmative inducement of investment by the tax benefits promised in the J-51 program.

The court below also tried to suggest that it was not reasonable for Appellant to rely on the tax inducement program, pointing to the expiration of the state enabling statute (but not the City's tax inducement program). A-6. However, the court elsewhere acknowledged that "New York City's J-51 program . . . extended by local law to 1984" (A-6) and that it was only the retroactivity of the 1983 state legislation that resulted in the denial of benefits, *i.e.*, that the 1983 amended state statute "applies retroactively to prevent [Appellant] from qualifying for the receipt of the tax exemption." A-1.

The court never questioned that, throughout the period of Appellant's reliance, the City's J-51 program was in effect and that the City's announced position consistently was that developers should commence renovations in reliance upon it.

The Questions Presented On This Appeal Are So Substantial As To Require Plenary Consideration.

The issue of whether tax inducement statutes can be retroactively repealed is a question of first impression for the Court. The issue is of general importance in a legislative environment that increasingly uses elaborate tax inducement programs as an active tool to shape private investment. The standards by which courts of appellate jurisdiction have addressed the issue are inconsistent, and the decision of the New York Court of Appeals conflicts with the rationale of a federal circuit court.

1. Tax inducement statutes differ significantly from other tax statutes: by promises of tax relief in a sum certain, they encourage specific, voluntary investment to accomplish legislative goals.

The Court has created no precedent addressing the constitutional implications of this modern form of tax. In a series of decisions over fifty years ago, the Court determined that retroactive gift taxes violated the Due Process Clause, *e.g., Untermyer* v. *Anderson,* 276 U.S. 440, 445 (1928), and these decisions provide the proper guide for analysis. As summarized in *Welch* v. *Henry,* 305 U.S. 134 (1938), the gift taxes were struck down on the basis that the taxpayer, if forewarned, might not have engaged in the "voluntary act" that was later taxed:

> "the nature or amount of the tax could not reasonably have been anticipated by the taxpayer at the time of the particular voluntary act which the statute later made a taxable event."

305 U.S. at 147. The key question posed by *Welch* v. *Henry* is whether the taxpayer "might well have refrained from making [the gift] had he anticipated the tax". *Id.*

Applying the reasoning of the gift tax cases, *Welch* v. *Henry* permitted a retroactive tax on corporate dividends because no "voluntary act" was affected—the taxpayer would still desire the income, even if the amount were reduced by taxation. 305 U.S. at 148. In *United States* v. *Hemme,* 106 S. Ct. 2071 (1986), the Court, quoting *Welch* v. *Henry,* upheld retroactive change in taxation of gifts made in contemplation of death—the taxpayer there had no choice but to give or to bequeath, and the Court held that the change in tax allocation was not likely to affect the taxpayer's decision to dispose of the property:

> "[W]e must 'consider the nature of the tax and the circumstance in which it is laid . . .'. One of the relevant circumstances is whether, without notice, a statute gives a different and more oppressive legal effect to conduct undertaken before enactment of the statute."

106 S. Ct. at 2078.

The retroactive repeal of a tax inducement statute, by contrast, necessarily "gives a different and more oppressive legal effect to conduct undertaken" before repeal, because it taxes conduct which would never have been undertaken but for the inducement. The retroactive gift taxes that the Court struck down fifty years ago merely imposed a levy where none was expected; a retroactive change in a tax inducement program imposes a tax after affirmatively inducing the investment by promising there would be no such tax.

Application of this tax retroactively punishes the very conduct that was induced. By the nature of affirmative inducement, reliance is justified and any retroactive denial so unfair as to offend the Constitution. The broad issue raised on this appeal is whether, consistent with due process, any tax inducement statute can be retroactively repealed.

2. In conflict with the decision below, the Court of Appeals for the Second Circuit has held that tax regulations, after inducing specific behavior by the taxpayer, can not retroactively be changed to deprive the taxpayer of the tax benefits promised. *LeCroy Research Systems Corp.* v. *Commissioner,* 751 F.2d 123 (2d Cir. 1984). According to the Second Circuit, which struck the regulations as an "abuse of discretion," the retroactive denial of the benefits promised in return for specific conduct "smells of a bush-whack." 751 F.2d at 128.

The approach adopted by the New York Court of Appeals is not to analyze the nature of the tax but to draw a simplistic distinction on permissible retroactivity between taxes on income-producing activities—such as income and property taxes—and "other kinds of taxes," such as gift taxes. Because the J-51 inducement involves relief from

property taxes, the court below held it was not subject to any scrutiny beyond review of general guidelines such as the length of retroactivity.

Considerations of due process should not turn on arbitrary tax categories, but other appellate courts, apparently also misled by statements from *Welch* v. *Henry* read out of context,[4] have announced similar simplistic formulations. *E.g., Estate of Ekins,* v. *IRS,* 797 F.2d 481, 484 (7th Cir. 1986) (drawing the constitutional line on retroactivity as prohibiting a "new tax" and permitting changes in pre-existing taxes.) *See also United States* v. *Wells Fargo Bank,* No. 86-1521, where, in a pending appeal involving estate taxes, the Solicitor General argues that the Court's gift tax cases "stand, at most, for the proposition that a 'wholly new tax' cannot be imposed retroactively" (Brief for the United States, at 40).

All these formulations fail to consider the impact of a tax change on past voluntary behavior and, in the court below, on past conduct specifically induced. These erroneous formulations of due process require correction.

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[4] The court below apparently derived its constitutional distinction from the following out-of-context quotation from *Welch* v. *Henry,* 305 U.S. at 147-48:

> "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases . . . Similarly, a tax on the receipt of income is not comparable to a gift tax."

See A-4. The court below apparently ignored the logic of these statements in *Welch* v. *Henry—i.e.,* that property and income taxes generally tax wealth, and do not affect voluntary acts—as that decision made clear in the immediately following language:

> "We can not assume that stockholders would refuse corporate dividends even if they knew that their receipt would later be subjected to a new tax or to the increase of an old one."

Tax inducement statutes and programs are increasingly used by states and local governments as a tool to foster new development, industrial expansion and, as here, renovation of substandard inner-city housing. The constitutional issues raised by legislative changes to these statutes differ in kind from those of general revenue-raising statutes, and need to be addressed by the Court. This case presents the question squarely: Where by their terms tax inducement programs create entitlements, should the Due Process Clause permit retrospective withdrawal of the inducement after reliance?

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction, and hear the appeal.

Respectfully submitted,

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January 29, 1988

APPENDIX

Decision of the Court of Appeals of the State of New York

No. 252

In the Matter of Replan Development, Inc. *et al.*,

Appellants,

v.

Department of Housing Preservation and Development of the City of New York *et al.*,

Respondents.

Philip K. Howard, NY City, for appellant.

Peter L. Zimroth, NYC Corporation Counsel (Lisa Kaplan, Joseph I. Laver & Judith R. Greenwald of counsel) for respondent.

OPINION

This opinion is uncorrected and subject to revision before publication in the New York Reports.

ALEXANDER, J.:

In the circumstances of this appeal, petitioner, a real estate developer, could not have justifiably relied on the provision for a tax exemption from certain increases in the assessed value of property in former section 489 of the Real Property Tax Law at the time he commenced renovation on his two vacant buildings. The amended version of that tax statute, which applies retroactively to prevent petitioner from qualifying for the receipt of the tax exemption, *therefore*, does not unconstitutionally deprive him of due process.

In April 1982, petitioner purchased two abandoned buildings on West 22nd Street in the Chelsea area of Manhattan that were bricked up and had been continuously vacant for one year. Their last certified use were as class B multiple dwellings for Single Room Occupancy (SRO) (*see* Multiple Dwelling Law § 4[9],[16]). At the time of petitioner's purchase, former section 489 of the Real Property Tax Law provided in relevant part that "any city to which the multiple dwelling law is applicable, acting through its local legislative body * * * is * * * empowered, to and including [June 1st, 1982], to adopt and amend local laws * * * providing that any increase in assessed valuation of real property shall be exempt from taxation * * * to the extent such increase results from * * * the conversion of any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy * * * to a class A multiple dwelling * * * not used in whole or in part for single room occupancy" (RPTL § 489 as amended L 1977, c 850 eff Aug. 11, 1977). Pursuant to this enabling legislation, the City of New York had enacted former section J-51-2.5 of the Administrative Code of the City of New York, creating the so-called "J-51 program" and providing, in accordance with the enabling legislation, a tax exemption for the renovation of SRO's. The City provided, by amendment made before 1982, that its J-51 program would be valid to 1984 (*see* Local Law No. 77, approved November 14, 1979).

In the hope of obtaining a J-51 tax exemption, petitioner filed the necessary architectural plans to restore the buildings, obtained the appropriate certificates, and secured a building permit in April 1983. Immediately thereafter, he commenced renovation of his two buildings into one class A multiple dwelling containing eight cooperative apartments not certified for single room occupancy. Two months

later, however, on June 30, 1983, the Legislature amended RPTL § 489 to repeal the tax exemption for the conversion of SRO's. Moreover, the Legislature provided that the withdrawal of the exemption be applied retroactively to any SRO conversions commenced in the year prior to the effective date of the amendment, i.e. on or after June 1, 1982 (RPTL § 489 as amended L 1983, c 401 eff June 30, 1983, retroactive to June 1, 1982). While originally, the J-51 program was designed to encourage renovation and development of class B multiple dwellings in order to increase the supply of class A residential housing, the amendment evidences the Legislature's attempt to preserve what had become recognized as an important but rapidly disappearing source of low-income housing by eliminating the tax incentive to convert SRO's. Consistent with the new legislative purpose, retroactive application of the amendment sought to discourage SRO owners from acting precipitously—perhaps by questionable means—to vacate their buildings in order to commence conversion before the effective date of the amendment. The same amendment was incorporated into the Administrative Code effective November 7, 1983 and made retroactive to July 1, 1982 (7 Admin Code § J-51.2.5(i)[6], amended § 11-243). Having commenced the conversion of his two buildings in April 1983, petitioner falls squarely within the retroactive period of both the State and local amendments.

Nevertheless, on January 11, 1984, petitioner applied for real estate tax benefits under the J-51 program. Respondent, the Department of Housing Preservation and Development of the City of New York, determined that, due to the change in the law, petitioner was ineligible for the J-51 tax exemption and denied his application accordingly. In this article 78 proceeding challenging that determination, petitioner argues that he is entitled to the J-51 tax benefit because he acted in reliance on the inducement in the City

law and in former RPTL § 489, and because retroactive denial of the exemption unconstitutionally deprives him of due process. Supreme Court upheld respondent's determination and dismissed the petition, holding that the retroactive legislation at issue was constitutional as applied to petitioner. The Appellate Division affirmed.

We agree with both lower courts that the retroactive application of the tax amendment in question does not unconstitutionally deprive petitioner of due process. Retroactivity provisions in tax statutes, if for a short period, are generally valid (*Neuner* v *Weyant*, 63 AD2d 290, *appeal dismissed* 48 NY2d 975; *Clarendon Trust* v *State Tax Comm.*, 43 NY2d 933, 934; *People ex rel. Beck* v *Graves*, 280 NY 405, 409; *Welch* v *Henry*, 305 US 134, 146; *Milliken* v *United States*, 283 US 15), and ordinarily are upheld against due process challenges, unless in light of "the nature of the tax and the circumstances in which it is laid", the retroactivity of the law is "so harsh and oppressive as to transgress the constitutional limitation" (*Welch* v *Henry*, 305 US 134, 147, *supra*). Indeed, retroactive application of property taxes and benefit assessments of real estate have been distinguished from the unfavored retroactivity of "other kinds of taxes" (*see, e.g., Untermeyer* v *Anderson*, 276 US 440, 445 [retroactive taxation of inter vivos gift]) on the theory that the taxpayer received some economic benefit from the conduct aside from the tax benefit (*see, e.g., Welch* v *Henry*, 305 US 134 [retroactive taxation of corporate dividends]). Whether the retroactive application of a tax statute is "harsh and oppressive" is a "question of degree" (*People ex rel. Beck* v *Graves*, 280 NY 405, 409, *supra*), requiring a "balancing [of] the equities" (*Clarendon Trust* v *State Tax Comm.*, 43 NY2d 933, 934, *supra*).

In reaching the appropriate balance, several factors may be considered. First, and perhaps predominant, is the tax-

payer's forewarning of a change in the legislation and the reasonableness of his reliance on the old law (*see Matter of Chrysler Props.* v *Morris*, 23 NY2d 515, 521; *Neuner* v *Weyant*, 63 AD2d 290, 300, *supra; see also United States* v *Hudson*, 299 US 498). This inquiry focuses on whether "the taxpayer's 'reliance' has been justified under all the circumstances of the case and whether his 'expectations as to taxation [have been] unreasonably disappointed' " (*Neuner* v *Weyant*, 63 AD2d 290, 300, quoting *Wilgrad Realty Co.* v *Commissioner of Internal Revenue*, 127 F2d 514, 517). The strength of the taxpayer's claim to the benefit may be significant if he has "obtained a sufficiently certain right to the money" prior to the enactment of the new legislation (*see Matter of Chrysler Props* v *Morris*, 23 NY2d 515, 519, *supra*). Additionally, the length of the retroactive period often has been a crucial factor, and excessive periods have been held to unconstitutionally deprive taxpayers of a reasonable expectation that they "will secure repose from the taxation of transactions which have, in all probability, been long forgotten" (*Neuner* v *Weyant*, 63 AD2d 290, 302; *see, e.g., Matter of Lacidem Realty Corp.* v *Graves*, 288 NY 354, 357 [4-year retroactivity period excessive]; *People ex rel. Beck* v *Graves*, 280 NY 405, 409-410 [16-year retroactivity period excessive]). Finally, the public purpose for retroactive application is important because of the taxing authority's legitimate concern that "evasive measures taken after introduction of a bill but before enactment might frustrate the purpose of the legislation" (*see Neuner* v *Weyant*, 63 AD2d 290, 302, and 299-302, *supra; Clarendon Trust* v *State Tax Comm.*, 43 NY2d 933, 935 [retroactivity too harsh in absence of valid public purpose]).

Here, the relevant considerations do not militate in petitioner's favor. Petitioner concedes that the period of retroactivity—one year—is not excessive. The objectives of the

retroactive application—to forestall the loss of SRO housing and to discourage the precipitous eviction of tenants—are valid public purposes. That petitioner's two buildings were vacant at the time he commenced conversion and therefore no low-income tenants could have been rushed to eviction, does not diminish the fact that petitioner nonetheless caused a further decrease in the SRO housing stock—precisely what the amendment sought to discourage. More importantly, we are persuaded that petitioner could not have justifiably relied on the tax inducement as it existed in 1982. New York City's J-51 program—although extended by local law to 1984—was subject to such changes as may have been made in the state enabling legislation itself, which authorized the tax exemption in the first instance. Petitioner was forewarned that the State authorization expired on June 1, 1982 thereby calling into question the continued validity of the local law after that date. With such notice, petitioner may not now claim he entertained a settled reasonable expectation of entitlement to the City's exemption based upon renovations he did not commence until April 1983. *We conclude* therefore that respondent's application of this particular retroactive provision to petitioner did not constitute an unconstitutional deprivation of due process (*see Welch* v *Henry,* 305 US 134).

We have reviewed petitioner's remaining contentions and find them to be without merit. Accordingly, the order of the Appellate Division should be affirmed, with costs.

* * *

Order affirmed, with costs. Opinion by Judge Alexander. Chief Judge Wachtler and Judges Simons, Kaye, Titone, Hancock and Bellacosa concur.

Decided November 19, 1987

Order of the Appellate Division
State of New York

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on December 9, 1986

Present:

HON. THEODORE R. KUPFERMAN,

Justice Presiding

DAVID ROSS
JOHN CARRO
ERNST H. ROSENBERGER
BETTY WEINBERG ELLERIN,

Justices.

28477

In the Matter of the Application of

Replan Development, Inc. and
Edward C. Rubin,

Petitioners-Appellants,

For a Judgment pursuant to Article 78 of the CPLR,

—against—

Department of Housing Preservation and Development of the City of New York and The City of New York,

Respondents-Respondents.

An appeal having been taken to this Court by the petitioners-appellants from a judgment of the Supreme Court,

New York County (Harold Baer, Jr., J.), entered on April 10, 1986, and said appeal having been argued by Philip K. Howard of counsel for the appellants, and by Judith R. Greenwald of counsel for the respondents; and due deliberation having been had thereon:

It is unanimously ordered that the judgment so appealed from be and the same is hereby affirmed, without costs and without disbursements.

ENTER:

HAROLD J. REYNOLDS
Clerk.

Decision and Order of the Supreme Court
State of New York, County of New York

SPECIAL TERM—PART I

Index No. 7124/85

#23 of 4/30/85

In the Matter of the Application of

REPLAN DEVELOPMENT, INC. and EDWARD C. RUBIN,

Petitioners,

For a judgment pursuant to Article 78 of the CPLR

—against—

DEPARTMENT OF HOUSING PRESERVATION and DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Respondents.

HAROLD BAER, JR., J.:

This is an Article 78 proceeding in which petitioner, Replan Development, Inc. and Edward C. Rubin ("Replan"), seek to overturn a determination by respondents, the Department of Housing Preservation and Development of the City of New York ("HPD") and the City of New York, denying Replan tax exemption-abatement benefits under section J51-2.5 of the Administrative Code of New York City (the "Code") with respect to property located at 427-429 West 22nd Street in Manhattan.

After a review of Replan's application, HPD found that the real property in question was ineligible for J51 benefits since Replan's conversion from two Class B single room

occupancy buildings (SRO) to a single Class A multiple dwelling, did not commence before the statutory cut-off date of July 1, 1982. Section J51-2.5(i)(6), in the language of its enabling act, New York Real Property Tax Law Section 489 (Law of 1983, ch. 401, sec. 6) specifically provided that J51 benefits shall not be granted "to any conversion of or alteration or improvement, commenced on or after July first nineteen hundred eighty-two, to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy . . ." Replan asserts three arguments in support of its petition to void HPD's determination.

First, it contends that conversion of the property commenced prior to July 1, 1982, relying on the definition of "commencement" contained in section J51-5.0(a)(4) of the Code which provides " '[c]ommencement of eligible improvement' shall mean the beginning of any physical operation undertaken for the purpose of making eligible improvements to eligible real property." Replan urges that "physical operation" should include the installation of a new security door which was begun before July 1, 1982, and consequently petitioner must prevail.

Reliance on section J51-5.0(a)(4) definition is misplaced. That section provides real estate tax benefits for a class of dwellings different than those at issue here. Specific regulations have been promulgated by HPD which cover Replan's buildings. Under these regulations, commencement means the date a building permit is issued or the filing of a building notice with the Department of Buildings. Although petitioner *filed* for a permit before July 1, 1982, it was not *issued* until April 7, 1983 well after the July 1, 1982 cutoff.

Replan next urges that its buildings were not "used in whole or in part for single room occupancy", rather they

urge, the buildings were vacant and boarded up at the time the conversion was undertaken and that the term "used" as an SRO and vacant building are mutually exclusive. An SRO they urge requires the physical presence of tenants. I disagree.

Where physical occupancy of a building is the intended meaning, the statute so states. *E.g.,* 7 Admin. Code sec. J51-2.5(b)(5) (1984-85) (refers to a "substantially occupied" dwelling). Second, courts which have previously considered this issue have concluded that vacant buildings may be excluded from J51 benefits. *See Futterman* v *HPD,* Index No. 2589/85 (Sup Ct NY Co. 1985); *Application of 311 West 76th Owners Corp.* v *City of New York,* Index No. 3275/85 (Sup Ct NY Co. 1985). Third, courts should defer to the interpretation given a statute by the agency charged with its enforcement if that interpretation is, as it is in the case at bar, neither irrational, unreasonable, nor inconsistent with the governing statute. *Matter of Trump-Equitable Fifth Avenue Company* v *Gliedman,* 57 N.Y.2d 588, 597 457 NYS2d 466 (1982).

Finally, Replan asserts that the retroactive nature of section J51-2.5 renders it unconstitutional. In *Neuner* v *Weyant,* 63 AD2d 290, 408 NYS2d 89 (2d Dept. 1978), the court noted that generally retrospective tax legislation is to be upheld as constitutional, unless it is "harsh and oppressive" and as a consequence, found to be a deprivation of due process. *Neuner,* 408 NYS2d at 95; *see Welch* v *Henry,* 305 U.S. 134, 147 (1938). Considerations that influence courts in this regard include: (1) whether a "voluntary act" was done, which might not have been done if the taxpayer knew of the impending legislation; (2) the taxpayer's reasonable reliance, and whether his expectations as to taxation were unreasonably disappointed; (3) the length of the retroactive period, (4) the public purpose to

be served by retroactive civil legislation. *Neuner*, 408 NYS2d at 95-97. The question then, is whether any of the considerations are persuasive in this case.

Taking each consideration in order: There is no evidence that petitioner Replan's voluntary act of buying the property and beginning its conversion would not have occurred had they known of the impending legislation. Indeed, following its enactment, petitioners continued their conversion plans. Secondly, the prior law providing J51 benefits expired on June 30, 1982 and was not reinstituted until June 1983. A significant amount of Replan's work paving the way for conversion occurred after the legislation expired and Replan can hardly be heard to suggest that it relied on the benefits of the legislation when the legislation was no longer extant. Third, the length of the retroactive period, one year, is not under the circumstances excessive; and finally, the legislature was concerned that SRO owners would act precipitously to vacate their SRO's in order to commence conversions and retrospective application of J51-2.5 is consistent with and appropriate in the effort to avoid that evil.

Accordingly, the application is denied and the petition is dismissed.

This constitutes the decision and order of the court.

Dated: April 2, 1986

HB, Jr.
J.S.C.

Notice of Appeal

New York County Index No. 7124/85

COURT OF APPEALS
OF THE STATE OF NEW YORK

In the matter of the Application of
REPLAN DEVELOPMENT, INC. and EDWARD C. RUBIN,
Petitioners-Appellants,

For a judgment pursuant to Article 78 of the CPLR

—against—

DEPARTMENT OF HOUSING PRESERVATION
and DEVELOPMENT OF THE CITY OF NEW YORK
and THE CITY OF NEW YORK,
Respondents-Appellees.

NOTICE OF APPEAL

PLEASE TAKE NOTICE that Petitioners Replan Development, Inc. and Edward C. Rubin hereby appeal, pursuant to 28 U.S.C. § 1257, to the United States Supreme Court from each and every part of the judgment of the Court of Appeals of the State of New York entered on November 19, 1987.

Dated: New York, New York
January 26, 1988

HOWARD, DARBY & LEVIN
10 East 53rd Street
New York, New York 10022
(212) 751-8000
Attorneys for
Petitioners-Appellants

Filed in the New York Court of Appeals on January 27, 1988

To:

CLERK OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207

CLERK OF THE SUPREME COURT
OF THE STATE OF NEW YORK
New York County
60 Centre Street
New York, New York 10007

PETER L. ZIMROTH, ESQ.
Corporation Counsel
Attorneys for Respondents-Appellees
100 Church Street, Room 5G2
New York, New York 10007
(212) 566-0562

Letter to Edward C. Rubin, dated March 21, 1985

THE CITY OF NEW YORK

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT

[LETTERHEAD]

March 21, 1985

Mr. Edward C. Rubin
Replan Development, Inc.
1133 Broadway
New York, New York 10010

Re: J51#1086/84
429 West 22nd Street
Borough of Manhattan
Block: 720 Lot: 33

Dear Mr. Rubin:

Be advised that after very careful consideration, we have determined that the above referenced property is ineligible for real estate tax exemption and abatement pursuant to Section J51-2.5 of the Administrative Code of the City of New York.

Section J51-2.5(i)(6) provides that tax benefits are not available "to any conversion of or alteration or improvement, commenced on or after July first, nineteen hundred eighty-two, to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy. . . ."

The application for the above referenced property indicates that you are seeking benefits for the conversion of class B multiple dwelling to a class A multiple dwelling.

Section 2.4(5) of the J51 rules and regulations defines commencement as the "date of issuance of a permit by a City agency". Inasmuch as the Alteration Permit issued by the Department of Buildings for the referenced property is dated April 7, 1983, that date is seen as the commencement of the conversion.

Therefore, the conversion of the referenced property from a class B to a class A multiple dwelling is not eligible for J51 real estate tax benefits as construction commenced after the statutory cut-off date of July 1, 1982.

Sincerely,

/s/ LAWRENCE B. FINKELSTEIN
Lawrence B. Finkelstein
Director
Tax Incentive Programs

cc: B. Rottenstein
P. Howard
File

Constitutional Provisions and Statutes Involved

Constitution of the United States

Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment XIV

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male

inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss of emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

Section 489 of the New York Real Property Tax Law

§ 489. Exemption from taxation of alterations and improvements to multiple dwellings to eliminate fire and health hazards; abatement

1. (a) Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred eighty-six, to adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes, as provided herein, to the extent such increase results from:

* * *

13. Additional limitation. The benefits of this section shall not apply to any conversion of or alteration or

improvement to any Class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.

* * *

(Added L.1960, c. 968, § 1; amended L.1961, c. 756, § 1; L.1962, c. § 814, §§ 1 to 3; L.1962, c. 815, § 1; L.1962, c. 817, §§ 1,2; L.1963, c. 1002, § 1; L.1964, c. 683, §§ 1 to 5; L.1965, c. 705; L.1966, c. 847, §§ 1 to 5; L.1967, c. 701, §§ 1 to 6; L.1970, c. 375, § 1; L.1973, c. 409, § 1; L.1975, c. 852, §§ 1,2; L.1977, c. 850, §§ 1 to 3; L.1979, c. 680, §§ 1,2; L.1980, c. 848, § 4; L.1980, c. 849, § 1; L.1980, c. 889, § 5; L.1983, c. 401, §§ 1 to 6; L.1983, c. 797, § 1.)

Historical Note

1983 Amendment. Subd. 1, par. (a), opening subpar. L.1983, c. 401, § 1, eff. June 30, 1983, retroactive to June 1, 1982, substituted "nineteen hundred eighty-six" for "nineteen hundred eighty-two" and inserted ",as provided herein,".

* * *

Subd. 11 to 15. L.1983, c. 401, § 6, eff. June 30, 1983, retroactive to June 1, 1982, added subds. 11 to 15.

Section J51-2.5 (now Section 11-243) of the Administrative Code of the City of New York, and regulations thereunder

§ 11-243 Reextension of exemption and tax abatement in regard to improvements of substandard dwellings.

* * *

b. Subject to the limitations provided in subdivision d of this section and the restrictions in this section on conversion of buildings used in whole or in part for single room occupancy, any increase in the assessed valuation of real property shall be exempt from taxation for local purposes to the extent such increase results from the reasonable cost of: (1) the conversion of a class B multiple dwelling to a class A multiple dwelling except insofar as the gross cubic content of such building is increased thereby; or (2) the conversion of any nonresidential building or structure situated in the county of New

York to a class A multiple dwelling except insofar as the gross cubic content of such building is increased thereby; or (3) the conversion of any nonresidential building or structure situated in the counties of Bronx, Kings, Queens or Richmond to a class A multiple dwelling except insofar as the gross cubic content of such building or structure is increased thereby; or (4) alterations or improvements to the exterior of an otherwise eligible building or structure visible from a public street pursuant to a permit issued by the landmarks commission with respect to a designated historic or landmark site or structure; or (5) alterations or improvements constituting a moderate rehabilitiation of a substantially occupied class A multiple dwelling except insofar as the gross cubic content of such building or

structure is increased thereby; or (6) alterations or improvements to an otherwise eligible building or structure commenced after January first, nineteen hundred eighty designed to conserve the use of fuel, electricity or other energy sources including the installation of meters for purposes of measuring the amount of electricity consumed for each dwelling unit; or (7) alterations or improvements to existing dwellings to eliminate existing unhealthy or dangerous conditions in any such existing dwelling or replace inadequate and obsolete sanitary facilities in any such existing dwelling, any of which represents fire or health hazards, except insofar as the gross cubic content of such existing dwelling is increased thereby; or (8) conversion of residential units qualified for the protection of article seven-C of

the multiple dwelling law in buildings or portions thereof registered with the New York city loft board as interim multiple dwellings pursuant to such article to units which are in compliance with the standards of safety and fire protection set forth in article seven-B of the multiple dwelling law or to units which have a certificate of occupancy as class A multiple dwellings; provided that, except for conversions described in paragraph eight of this subdivision construction is completed within twenty-four months after the date on which it was started if started before January first, nineteen hundred seventy-nine or within thirty-six months from the date on which it was started if started on or after January first, nineteen hundred seventy-nine, and provided that in any event construction shall be completed

prior to December thirty-first, nineteen hundred eighty-eight. To qualify for benefits described in paragraph eight of this subdivision, construction started on or after July first, nineteen hundred seventy-seven shall be completed no later than the date on which completion is required pursuant to article seven-C of the multiple dwelling law, including extensions of time to complete construction, if any, which may be granted by the loft board, and provided that in any event construction shall be completed prior to December thirty-first, nineteen hundred eighty-eight; and provided further that construction started prior to July first, nineteen hundred seventy-seven must have been completed within twenty-four months from the date construction was actually commenced. Such exemption shall continue

for a period of twelve years, except for alterations or improvements done pursuant to paragraph five of this subdivision for which exemption shall continue for a period of thirty-two years, commencing on the July first following filing as provided in subdivision h of this section and provided further that such period of exemption may commence on the later of the first day of the first tax quarter following commencement of any conversion, alteration or improvement; or (i) July first, nineteen hundred seventy-six, if aided by a loan pursuant to article eight of the private housing finance law and completed after December thirty-first, nineteen hundred seventy-five; or (ii) July first, nineteen hundred seventy-seven, if aided by a loan pursuant to article fifteen of the private housing finance law; or (iii)

July first, nineteen hundred eighty, if aided by a loan pursuant to article eight-A of the private housing finance law; or (iv) July first, nineteen hundred eighty, if aided by a loan pursuant to section three hundred twelve of the housing act of nineteen hundred sixty-four (42 U.S.C.A. § 1452b). The assessed valuation of the land occupied by such dwelling and any increase in assessed valuation resulting from conversion, alterations, improvements other than those made pursuant to this section shall not be affected by the provisions of this section.

* * *

i. The benefits of this section shall not apply: ...

* * *

(6) to any conversion of or alteration or improvement, commenced on

or after July first, nineteen hundred eighty-two, to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.

* * *

HISTORICAL NOTE

Formerly § J51-2.5

* * *

Subd. i(6) added by L.L. 1983, No. 56, § 6, November 7, eff. June 1, 1982.

* * *

§ 244 Tax exemption and abatement for rehabilitated buildings.

a. As used in this section, the following terms shall have the following meanings:

* * *

4. "Commencment of eligible improvement" shall mean the beginning of any physical operation undertaken for the purpose of making eligible improvements to eligible real property.

DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT

Notice of the Rules and Regulations, as Amended, Governing Tax Exemption and Tax Abatement, Pursuant to Section J51-2.5 of the Administrative Code of The City of New York and Section 489 of the Real Property Tax Law.

NOTICE IS HEREBY GIVEN, PURSUANT TO THE authority vested in the Commissioner of the Department of Housing Preservation and Development, by Section J51-2.5 of the New York City Administrative Code and Chapter 61 of the New York City Charter, and in accordance with the requirements of Section 1105 of the New York City Charter, that the Department of Housing Preservation and Development promulgates and adopts amendments to the present rules and regulations governing tax exemption and tax abatement pursuant to Section J51-2.5 of said Administrative

Code and Section 489 of the Real Property Tax Law to read as follows:

TITLE 1: SCOPE OF THE RULES AND REGULATIONS; CONSTRUCTION; DEFINITIONS
- Section 1.1 Scope
- Section 1.2 Construction
- Section 1.3 Definitions

TITLE 2: ELIGIBLE PROJECTS; ELIGIBILITY REQUIREMENTS
- Section 2.1 Eligible Projects
- Section 2.2 Eligible Items of Work: Major Capital Improvements
- Section 2.3 Eligible Items of Work: Ordinary Repairs
- Section 2.4 Time Requirements
- Section 2.5 Construction and Maintenance Requirements
- Section 2.6 Rent Regulatory Requirements
- Section 2.7 Special Limitations for Cooperatives and Condominiums
- Section 2.8 Special Requirements for Moderate Rehabilitation

TITLE 3: INELIGIBLE PROJECTS; ITEMS OF WORK
- Section 3.1 Ineligible Properties
- Section 3.2 Ineligible Items of Work

TITLE 4: APPLICATION PROCEDURE; DOCUMENTATION
- Section 4.1 Application Forms
- Section 4.2 Preliminary Application
- Section 4.3 Application Filing
- Section 4.4 Documentation Required of All Applicants

Section 4.5 Additional Documentation for Buildings Owned as Cooperatives or Condominiums
Section 4.6 Additional Documentation for Certain Major Capital Improvements
Section 4.7 Filing Fees
Section 4.8 Issuance of a Certificate of Eligibility
Section 4.9 Filing with the Department of Finance

TITLE 5: TAX EXEMPTION/TAX ABATEMENT; COMMENCEMENT AND DURATION; AMOUNT
Section 5.1 Tax Exemption
Section 5.2 Tax Abatement

TITLE 6: RECORD KEEPING; REVOCATION OF TAX EXEMPTION/TAX ABATEMENT
Section 6.1 Subpoenas, Oaths, Books and Records
Section 6.2 Retention of Books and Records
Section 6.3 On-going Program Review
Section 6.4 Preservation and Inspection of Records
Section 6.5 Revocation or Reduction of Tax Exemption and Tax Abatement
Section 6.6 Additional Grounds for Revocation
Section 6.7 Notice of Revocation
Section 6.8 Non-Discrimination

TITLE 7: REHABILITATION SCHEDULE; DETERMINATION OF REASONABLE COST; DOLLAR LIMITS; ITEMIZED COST BREAKDOWN SCHEDULE
Section 7.1 Definitions

Section 7.2 Dollar Limit Procedure for Rehabilitation of a class A Multiple Dwelling
Section 7.3 Dollar Limit Procedure for Conversion to a class A Multiple Dwelling
Section 7.4 Itemized Cost Breakdown Schedule

TITLE 1: SCOPE OF THE RULES AND REGULATIONS; CONSTRUCTION; DEFINITIONS

Section 1.1 Scope

These Rules and Regulations govern the grant of tax exemption and tax abatement pursuant to Section 489 of the Real Property Tax Law of the State of New York, Section J51-2.5 of the Administrative Code of the City of New York and chapter 61 of the New York City Charter, including the procedure for filing an application for tax exemption and tax abatement and the issuance of Certificates of Eligibility and Reasonable Cost by the Office of Development of the Department of Housing

Preservation and Development.

Section 1.2 Construction

These Rules and Regulations are to be construed to secure the effectuation of the purpose of Section 489 of the Real Property Tax Law and Section J51-2.5 of the Administrative Code and in accordance with the general principal of law that exemption statutes are strictly construed against the taxpayer applying for the exemption.

* * *

TITLE 2: ELIGIBLE PROJECTS; ELIGIBILITY REQUIREMENTS

Section 2.1 Eligible Projects

The following classes of projects may be granted tax exemption and tax abatement:

(1) Conversion of any building or structure classified as a Class B multiple dwelling at the time of the

commencement of the conversion into a class A multiple dwelling.

(2) Conversion of any non-residential building or structure situated in the borough of Manhattan into a class A multiple dwelling, provided construction actually commenced prior to July 1, 1980 pursuant to an alteration permit issued by the Department of Buildings prior to July 1, 1980, and the building was a non-residential building immediately prior to the commencement of the conversion.

(3) Conversion of any non-residential building or structure situated in the borough of Manhattan into a class A multiple dwelling provided construction actually commenced on or after July 1, 1980 and the building was a non-residential building

immediately prior to the commencement of the conversion.

(4) Conversion of any non-residential building or structure situated in the boroughs of the Bronx, Brooklyn, Queens or Staten Island into a class A multiple dwelling provided the building was a non-residential building immediately prior to the commencement of the conversion.

(5) Alterations or improvements to the exterior of a building or structure visible from a public street, provided the alterations or improvements are made pursuant to a permit issued by the City Landmarks Commission and the building or structure is either an existing dwelling or a building or structure other than a private dwelling which

is being converted into a class A multiple dwelling.

(6) Alterations or improvements constituting a moderate rehabilitation of a substantially occupied class A multiple dwelling provided the project meets all of the conditions set forth below.

* * *

Section 2.4 Time Requirements

(1) In order to receive the tax benefits provide by the Act, eligible projects must be completed: within twenty-four months if commenced prior to January 1, 1979; or within thirty-six months if commenced on or after January 1, 1979 or prior to December 31, 1984, whichever is sooner.

(2) "Completion" means the earlier of the following dates:

(a) The date of issuance or reissuance of a certificate of occupancy;

(b) The date of issuance of a temporary certificate of occupancy for all of the dwelling units therein provided the only work remaining to secure a certificate of occupancy is work to be performed or completed in space to be used exclusively for non-residential purposes;

(c) The date of issuance of a letter of completion by the Department of Building if issued in connection with the alterations or improvements or conversion;

(d) The date of issuance of a certificate of completion or compliance or other evidence of completion if required to be issued

by a City agency other than the Department of Buildings.

(3) If none of the documents set forth in Section 2.4 (2) above are required by law, completion means the date on which physical operations to undertake alterations or improvements are concluded as confirmed by an affidavit from the owner, or, at the discretion of the Office, a registered architect or a licensed professional engineer; or the submission of such information as may be required by the Office, including but not limited to, a copy of work contract, cancelled checks and a contractor's affidavit, which confirms such completion date to the satisfaction of the Office. If the cost of the work claimed is less than five thousand dollars, the Office may, in its discretion, accept owner's affidavit as to the date of completion

and waive some or all of the additional evidence and information.

(4) In order to receive the tax benefits provided by the Act, an application for certification of reasonable cost must be filed with the Office not later than forty-eight months following the commencement of the conversion, alteration or improvement.

(5) "Commencement" means the date of issuance of a permit by a City agency or the filing of a building notice with the Department of Buildings provided that for projects eligible pursuant to Section 2.1 (2) and (3), commencement means the actual commencement of construction in good faith based on a permit by a City agency.

(6) If neither the issuance of a permit by a City agency nor the filing of a building notice with the Department of

Buildings is required by law, commencement means the date any physical operation has begun to be commenced solely for the purpose of making eligible alterations or improvements, as confirmed by an affidavit from the owner, or, at the discretion of the Office, a registered architect or licensed professional engineer and the submission of such additional information as may be requested by the Office, including but not limited to a copy of the work contract, cancelled checks and contractor's affidavit. If the cost of the work claimed is less than five thousand dollars, the Office may, in its discretion, accept an owner's affidavit as to the date of completion and waive some or all of the additional evidence and information.

(7) Except for projects aided by a loan pursuant to the Private Housing Finance Law, an application for certification of reasonable cost must contain all documentation required by Title 4 and be complete and filed with the Office within twenty-four months of the initial filing date.

* * *

THE CITY OF NEW YORK

LOCAL LAW NO. 77

Approved November 14, 1979

EXTENDING J-51 PROGRAM TO 1984

EDWARD I. KOCH, Mayor

LOCAL LAW OF THE CITY OF NEW YORK

FOR THE YEAR 1979

No. 77

November 14, 1979

Introduced by Council Member Manton (by request of the Mayor); also Council Member Olmedo-

A LOCAL LAW to amend the administrative code of the city of New York, in relation to establishing an exemption for the moderate rehabilitation of multiple dwellings; limiting percentage of abatement for conversions of non-residential structures to class A multiple dwellings in New York county; extending the J-51 program to 1984; increasing certified reasonable costs to one hundred percent.

Be it enacted by the Council as follows:

Section 1. Subdivision a of section J51-2.5 of the administrative code of the city of New York as last amended by local law twelve for the year nineteen hundred seventy-eight is hereby amended to add two new paragraphs to be paragraphs 6 and 7 to follow paragraph 5 and to amend paragraph 1 to read as follows:

* * *

§ 2. Subdivision b of Section J51-2.5 of the administrative code of the city of New York as last amended by local law twelve for the year nineteen hundred seventy-eight is hereby amended to read as follows:

b. Subject to the limitations provided in subdivision d of this section any increase in the assessed valuation of real property shall be exempt from taxation for local

purposes to the extent such increase results from the reasonable cost of: (1) the conversion of any class B multiple dwelling to a class A multiple dwelling except insofar as the gross cubic content of such building is increased thereby; or (2) the conversion of any non-residential building or structure situated in the country of New York to a class A multiple dwelling except insofar as the gross cubic content of such building or structure is increased hereby; or (3) the conversion of any nonresidential building or structure situated in the counties of Bronx, Kings, Queens or Richmond to a class A multiple dwelling except insofar as the gross cubic content of such building or structure is increased thereby; or (4) alterations or

improvements to the exterior of an otherwise eligible building or structure visible from a public street pursuant to a permit issued by the landmarks commission with respect to a designated historic or landmark site or structure; or (5) alterations or improvements constituting a moderate rehabilitation of a substantially occupied class A multiple dwelling except insofar as the gross cubic content of such building or structure is increased thereby; or (6) alterations or improvements to an otherwise eligible building or structure commenced after January first, nineteen hundred and eighty designed to conserve the use of fuel, electricity or other energy sources; or (7) alterations or improvements to existing dwellings to

eliminate existing unhealthy or dangerous conditions in any such existing dwelling or replace inadequate and obsolete sanitary facilities in any such existing dwelling, any of which represent fire or health hazards, except insofar as the gross cubic content of such existing dwelling is increased thereby; provided that construction is completed within twenty-four months after the date on which it was started if started before January first, nineteen hundred seventy-nine or within thirty-six months from the date on which it was started if started on or after January first, nineteen hundred seventy-nine, and provided that in any event construction shall be completed prior to December thirty-first, nineteen

hundred eighty-four. Such exemption shall continue for a period of twelve years, except for alterations or improvements done pursuant to clause five of this subdivision b for which exemption shall continue for a period of thirty-two years, commencing on the July first following filing as provided in subdivision h of this section and provided further that such period of exemption may commence on the later of the first day of the first tax quarter following commencement of any conversion, alteration or improvement; or (i) July first, nineteen hundred seventy-six, if aided by a loan pursuant to article eight of the private housing finance law and completed after December thirty-first nineteen hundred seventy-five; or

(ii) July first, nineteen hundred seventy-seven, if aided by a loan pursuant to article fifteen of the private housing finance law. The assessed valuation of the land occupied by such dwelling and any increase in assessed valuation resulting from conversions, alterations, improvements other than those made pursuant to this section shall not be affected by the provisions of this section.

* * *

§ 4. Paragraph 2 of subdivision d of section J51-2.5 of the administrative code as last amended by local law twelve for the year nineteen hundred and seventy-eight is hereby amended to read as follows:

2. Except as hereinafter provided, to any building or

structure which is converted to a class A multiple dwelling or to any existing dwelling which is substantially rehabilitated, which is not used in whole or part for single room occupancy, and further provided that the rents subsequent to conversion or substantial rehabilitation shall not exceed such amount as may be fixed:

...

* * *

§ 5. Subdivision f of such section, as last amended by local law twelve for the year nineteen hundred seventy-eight is hereby amended to read as follows:

f. The department of housing preservation and development shall determine and certify the reasonable cost of any such conversions, alterations or improvements and eligibility for the benefits of this section. . .

Applications for certification filed on or after January first, nineteen hundred seventy-nine pursuant to this subdivision shall be made after completion and within forty-eight months following the start of construction of the conversion, alteration or improvement. Applications for certification filed prior to January first, nineteen hundred seventy-nine shall be made within thirty-six months following completion except that such application shall be filed no later than December thirty-first, nineteen hundred seventy-eight for a building or structure which is benefitted by mortgage insurance pursuant to section two hundred thirteen of the national housing act for alterations or improvements completed after

December thirty-first, nineteen hundred seventy-two and prior to December thirty-first, nineteen hundred seventy-five.

* * *

§ 9. Section J51-2.5 of the administrative code of the city of New York as last amended by local law twelve for the year nineteen hundred seventy-eight is hereby amended to add a new subdivision y to follow subdivision x to read as follows:

y. Applicants for benefits under the provisions of this section shall file with the department of finance a form supplied by said department which (i) states an intention to file for benefits under the provisions of this section, (ii) describes the work for which tax benefits will be claimed and (iii) estimates the cost

of such work which will be eligible for benefits. Such form shall be filed prior to the commencement of such work. If the scope of such work or the estimated cost thereof changes materially, applicant shall file a revised statement. Applicants who fail to comply with the requirements of this subdivision y shall be subjected to a penalty not to exceed one hundred per cent of the filing fee otherwise payable pursuant to subdivision n of this section.

§ 10. This local law shall take effect immediately.

The City of New York, Office of the City Clerk, s.s.:

I hereby certify that the foregoing is a true copy of a local law of The City of New York, passed by the Council on

October 13, 1979, and approved by the Mayor on November 14, 1979.

DAVID N. DINKINS, City Clerk,
Clerk of the Council

CERTIFICATION PURSUANT TO
MUNICIPAL HOME RULE LAW SECTION 27

Pursuant to the provisions of Municipal Home Rule Law Section 27, I hereby certify that the enclosed local law (Local Law No. 77 of 1979, Council Int. No. 715-A), contains the correct text and received the following vote at the meeting of the New York City Council on October 30, 1979: 29 for, 7 against and 3 not voting.

Was approved by the Mayor on November 14, 1979.

Was returned to the City Clerk on November 15, 1979.

ALLEN G. SCHWARTZ,
Corporation Counsel

JUNE 21, 1983 AMENDMENT
TO SENATE BILL NO. 1373-B

Amend SENATE BILL NO. 1373-B as follows:

Page 1, line 1 of caption, Strike out "Sen" and insert Sens line 1 of caption, After "DALY" insert , Jenkins

Strike out all after "AN ACT" and insert

to amend the real property tax law, in relation to extending the authority of certain cities to enact local laws for tax exemptions and tax abatements for alterations, improvements and conversions to multiple dwellings, and reforming the provisions for such laws

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. The opening paragraph of paragraph (a) of subdivision one of section four hundred eighty-nine of the real property tax law, as amended by chapter eight hundred forty-nine of the laws of nineteen hundred eighty, is amended to read as follows:

Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred [eighty-two] eighty-six, to adopt and amend local laws or ordinances providing

that any increase in assessed valuation of real property shall be exempt from taxation for local purposes, as provided herein, to the extent such increase results from:

§ 2. Subparagraphs one and five of paragraph (a) of subdivision one of section four hundred eighty-nine of such law; as amended, by chapter eight hundred forty-nine of the laws of nineteen hundred eighty, are amended to read as follows:

(1) conversion of [class B multiple dwellings or other] buildings or structures on such property to class A multiple dwellings not used in whole or in part for single room occupancy, including conversion of residential units qualified for the protection of article seven-C of the multiple dwelling law in buildings classified as interim multiple dwellings pursuant to such article to units which are in compliance with the standards of safety and fire protection set forth in article seven-B of the multiple dwelling law or to units which have a certificate of occupancy as class A multiple dwellings; or

(5) alterations or improvements constituting a moderate rehabilitation of a substantially occupied class A multiple dwelling within a city having a population of one million or more as certified by the local housing agency pursuant to local law or rules and regulations. Provided. . .

Statement pursuant to Rule 28.4(c) of the Rules of the Supreme Court of the United States

28 U.S.C. § 2403(b) may be applicable to this appeal.

(2)

Supreme Court, U.S.
FILED
MAR 3 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC. and
EDWARD C. RUBIN,

Appellants,

-against-

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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March 2, 1988

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No. 87-1275

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC. and
EDWARD C. RUBIN,

Appellants,

-against-

DEPARTMENT OF HOUSING PRESERVATION AND DEVELOPMENT OF THE CITY OF NEW YORK and THE CITY OF NEW YORK,

Appellees.

ON APPEAL FROM THE NEW YORK STATE COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

STATEMENT

Appellees move to dismiss appellants' appeal or, in the alternative, to affirm the judgment of the Court of Appeals of the State of New York entered November 19, 1987. The appeal does not present a substantial federal question. The law as to

retroactive tax legislation is well established and was properly applied.

QUESTION PRESENTED

Do §489 of the New York Real Property Tax Law and §11-243 (formerly §J51-2.5) of the Administrative Code of the City of New York, enacted pursuant thereto (collectively referred to as the "J51 law"), deprive appellants of any constitutional right, given that: (a) there could be no justified reliance on the prior law; (b) there were no vested rights to any tax benefits thereunder; (c) the retroactivity was for only one year; and (d) its public purpose was to prevent evasive measures occurring between the introduction of the bill and its enactment into law?

FACTS

(1)

"J51" is a statutory tax incentive program, originally enacted in 1955, to encourage improvements and alterations to existing buildings so as to increase the short supply of safe and habitable class A multiple dwellings. It is based on Real Property Tax Law ("RPTL") §489, the state enabling law, and Administrative Code of the City of New York ("Admin. Code") §11-243, the local law enacted for its effectuation.

The program provides for benefits in the form of partial exemption from real property taxation and abatement of remaining taxes to recoup the costs of alterations over a specified period of years. It is administered by the City's Department of Housing Preservation and Development ("HPD") which is authorized to promulgate rules and to make decisions.

All of the statutory conditions must be met to qualify for benefits. These include, inter alia, commencement and completion of reconstruction within the time limits set forth in the statute. Determination as to entitlement to benefits and the extent thereof is made by HPD after the application is received. Application cannot be made until after the work is finished. Consequently, no benefits vest merely upon commencement of a project.

The J51 law has been re-enacted and amended several times following its original enactment, each time with a fixed expiration date. Benefits have been expanded for certain types of projects and curtailed for others, in keeping with problems revealed by experience and goals of the program. The last re-enactment of RPTL §489, the enabling statute, became effective June 30, 1983. It was made retroactive to June 1, 1982, the

date when the prior version expired. Laws of 1983, chapter 401, §6 (M-A-1).[1] Consistent therewith, Admin. Code §J51-2.5 (now §11-243) was amended November 7, 1983, and also made retroactive to June 1, 1982. Local Law No. 56 of 1983, §11 (M-A-2).

As amended, these statutes expressly prohibit the grant of benefits for conversions of multiple dwellings that were used in whole or in part for single room occupancy ("SRO's") to class A multiple dwellings that are not so used. RPTL §489(1)(a)(1) and (13); Admin. Code §11-243(i)(6); (M-A-1-3). However, they contain a "grandfather clause" so that

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1 Parenthetical references to M-A are to the Appendix attached to this motion. Parenthetical references to JS-A are to the Appendix accompanying appellants' Jurisdictional Statement.

conversions of SRO's commenced prior to July 1, 1982 remained eligible for benefits. L. 1983, c. 401, §15 (M-A-1); Admin. Code §11-243(i)(6) and Local Law No. 56 of 1983 §11(1) (M-A-2-3). "Commencement" is defined in Section 2.4(5) of the J51 Tax Exemption and Tax Abatement Rules and Regulations as the date of issuance of a permit by a City agency (JS-A-41).[2]

SRO's serve to shelter low-income elderly and infirm persons and thus constitute an important part of the City's housing stock. When the J51 program resulted in large numbers of SRO's being

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[2] On page A-30 of the Jurisdictional Statement, appellants reprint a definition of commencement that is not taken from the J51 law or the rules promulgated thereunder. It comes from a different local law separately codified in the Administrative Code. The state courts rejected a previous attempt to apply this irrelevant section of the Code to this case (JS-A-10).

eliminated by conversion and demolition, the consequence was a serious loss in low-cost housing, forcing many former occupants to become homeless. To prevent this loss from growing even worse, the State Legislature, followed by the City Council, amended J51 to eliminate tax incentives for the conversion of SRO's to housing beyond the means of the low-income people who formerly occupied them. This was a clear legislative response to a public emergency.[3]

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[3] Indeed, the homeless problem addressed by RPTL §489(13) and Admin. Code §11-243(i)(6) is so grave that other ameliorative measures have also been enacted in an attempt to halt its expansion. Local Law No. 59 of 1985 prescribes a moratorium on any and all conversions, alterations, and demolitions of SRO's, and amends Local Law No. 19 of 1983 to tighten the regulatory controls of SRO landlords first instituted by Local Law No. 56 of 1982.

Appellants are the owners of property located at 427-429 West 22nd Street, Borough of Manhattan (officially designated Block 720, Lots 33, 34). When it was acquired, it consisted of two vacant class B multiple dwellings, certified as SRO's. Thereafter, appellants converted the buildings into one class A multiple dwelling containing eight cooperative apartments, not certified as an SRO. The permit for this conversion was issued by the City's Department of Buildings on April 7, 1983.

On January 11, 1984, after the J51 law was amended to prohibit benefits for the conversion of SRO's, appellants applied to HPD for benefits for the conversion of their buildings. HPD denied the applications on the ground that the conversion was commenced after July 1, 1982, the statutory cut-off date, and thus did not qualify.

OPINIONS BELOW

SUPREME COURT, NEW YORK COUNTY
(Not Reported)

The Supreme Court of the State of New York, New York County, upheld the constitutionality of the re-enactment and amendment of the J51 law. After examining the criteria established by court decisions to determine when retroactive legislation is constitutional, the court held that: (a) there was no evidence in this case that appellants would not have voluntarily taken exactly the same actions regardless of the impending legislation, as evidenced in part by their completion of the conversion even after the new law was enacted; (b) there could be no justifiable reliance on the law when it was no longer extant; (c) the length of the retroactive period was not excessive under the circumstances; and (d) the retroactivity served a valid public purpose of deterring evasive maneuvers in the period between the

introduction of the SRO bill and its enactment into law (JS-A-9-12).

APPELLATE DIVISION
125 AD2d 1014
508 NYS2d 965 (1st Dept., 1986)

The Appellate Division affirmed the judgment of Special Term, without opinion (JS-A-7-8).

NEW YORK COURT OF APPEALS
70 NY2d 451
517 NE2d 200
522 NYS2d 485 (1987)

The Court of Appeals unanimously affirmed the order of the Appellate Division. Judge Alexander, writing for the Court, stated that at the time appellants commenced their project, they could not have justifiably relied on the continued availability of J51 tax benefits. Under the circumstances, therefore, the retroactive application of the amendment to RPTL §489 and Admin. Code §11-243 did not effect an unconstitutional deprivation of due process rights.

The opinion reiterates the well established law, enunciated by both the New York state and federal courts, that retroactivity provisions in tax statutes, when limited to a short period, are generally valid and not vulnerable to due process challenges. The only exception is when the law is so harsh and oppressive that it transgresses the constitutional bounds. This is a question of degree, requiring a balancing of the equities.

The factors that must be balanced are the following: (a) forewarning to the taxpayer of a change in the law and, thus, the reasonableness of reliance on the old law; (b) the strength of the claim to the benefit prior to enactment of the new legislation; (c) the length of retroactivity; and (d) the public purposes served by retroactivity.

As noted in the opinion, the relevant considerations here did not militate in appellants' favor. The period of retroactivity was not excessive (conceded by appellants themselves, JS-A-5); the objectives of retroactive application served a valid public purpose; and most important, reliance on the continuation of the tax incentive program was not justified.

Appellants were forewarned that changes might be made in the program when the state enabling legislation expired on June 1, 1982, and was not immediately renewed. Therefore, appellants could not claim that, notwithstanding the signs to the contrary, it was reasonable to anticipate that their SRO conversions, commenced after the cut-off date, would qualify for the expired benefits. The Court of Appeals concluded that there could be no reasonable expectation of entitlement to prior J51 tax benefits based

on renovations commenced in 1983 (JS-A-1-6).

ARGUMENT

THIS APPEAL SHOULD BE DISMISSED FOR LACK OF A SUBSTANTIAL FEDERAL QUESTION. THE JUNE 1983 RE-ENACTMENT OF J51 DID NOT DEPRIVE APPELLANTS OF ANY CONSTITUTIONAL RIGHT. RELIANCE COULD NOT REASONABLY BE PLACED ON RE-ENACTMENT WITH THE SAME BENEFITS; THERE WAS NO VESTED RIGHT IN THE EXEMPTION; AND THE NEWLY ENACTED PROVISIONS SERVED A LEGITIMATE PUBLIC PURPOSE AND WERE REASONABLE IN DURATION.

There is universal agreement that retrospective tax legislation is not necessarily unconstitutional. Welch v. Henry, 305 U.S. 134, 146 (1948); Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue, 127 F.2d 514 (2d Cir.), cert. denied, 317 U.S. 655 (1942); Matter of Neuner v. Weyant, 63 AD2d 290, 298, 408

NYS2d 89, 94 (2d Dept., 1978), appeal dismissed, 48 NY2d 974, 401 NE2d 434, 425 NYS2d 1030 (1979).

Neuner involved the constitutionality of retroactive tax legislation, designed to delay implementation of a real property tax exemption. As shown by the federal and state case law discussed therein, retroactive tax legislation is generally upheld. With reference thereto the opinion specifically notes:

> "Legislation readjusting rights and burdens is not unlawful solely because it upsets otherwise settled expectations" (Usery v Turner Elkhorn Min. Co., 428 US 1, 16), and "taxpayers have no vested right either in any decision or in any statute" (Harte v United States, 152 F Supp 793, 797, aff'd 252 F2d 259). Retroactive tax legislation constitutes "legislative decision-making in the economic domain" and "[o]rdinarily, as long as the legislature's economic policies fall within the scope of its constitutional authority, foster no invidious discrimination, infringe no independent constitutionally protected interest, and reasonably serve legitimate legislative purposes, the substantive

requirements of Due Process are satisfied" (Matter of Cartridge Tel., 535 F2d 1388, 1392).

63 AD2d at 299, 408 NYS2d at 95.

Accordingly, the standards to determine whether retrospective tax legislation constitutes a denial of due process are: (1) whether the taxpayer took voluntary actions in reasonable reliance on the superseded law, (2) the strength of the taxpayer's claim to benefits, (3) whether a valid public purpose was served by retroactivity, and (4) whether the period of retroactivity was justifiable.

Applying these standards to the J51 legislation involved herein leaves no doubt that appellants' claim of unconstitutionality has no merit.

(1)

The first standard has two aspects: (a) whether the taxpayer's reliance on the superseded law was voluntary, and (b)

whether this reliance was justified based on the forewarning of a change in the legislation.

(a)

With reference to voluntary reliance, appellants argue that the J51 program induced them to purchase and renovate their buildings and that no change in that program was forewarned. They contend that, since the courts have generally held retroactive gift tax legislation to be unconstitutional on the ground that a taxpayer would not have voluntarily made the gift if change had been foreseen, the 1983 J51 law by analogy must similarly be held unconstitutional.

This strained argument has been properly rejected by the courts. To give a gift and to expect not to be taxed on it, is hardly comparable to buying taxable real property for reconstruction with the idea

that at some future date, if a variety of statutory qualifications are satisfactorily met, an application for a then to be determined amount of exoneration from tax liability might be granted. As stated in Welch v. Henry, 305 U.S. at 147: "Property taxes and benefit assessments of real estate, retroactively applied, are not open to the objection successfully urged in the gift cases."

Furthermore, the cases in which retroactive gift taxes were struck down were based on the important fact, not present herein, that it was a new tax never before imposed so that it could not have been reasonably anticipated. Welch v. Henry, 305 U.S. at 147; Estate of Ekins v. Commissioner of Internal Revenue, 797 F.2d 481, 484 (7th Cir. 1986). The retroactive elimination of a pre-existing tax exemption, as in the case at bar, however, is vitally different from

retroactive imposition of a new tax. Consequently, its validity is not governed by the precedent of the retroactive gift tax cases.

The significant distinction between the two types of tax laws was clearly drawn in Ekins. That case upheld the constitutionality of a retroactive amendment to the Internal Revenue Code, which "had the effect of eliminating an exemption for transfers of life insurance policies from the taxable value of decedent's gross estate." 797 F.2d at 482, 483 (emphasis added).

The court discussed two types of retroactive tax legislation, one that imposes a new tax, generally held to be unconstitutional because it could not be reasonably anticipated, and the other that involves merely a fluctuation in tax rate, which have been upheld as constitutional. As stated in the opinion, an elimination of an

exemption "is more analogous to the retroactive increase of the tax base of an already-existing tax approved in Darusmont [449 U.S. 292] than of a retroactive imposition of a wholly new kind of tax in the early decisions like Coolidge [274 U.S. 531 or 282 U.S. 582]." 797 F.2d at 484. The reasoning was that the tax was already in existence and the law eliminating the exemption merely reduced the categories of property eligible for exclusion from the pre-existing tax. Finally, the court opined that, "[w]ere we to reverse the United States Tax Court's decision, we would be taking the position that tax exemptions can never be repealed or enacted because of retroactivity." 797 F.2d at 485.

(b)

Nor can appellants succeed by citing gift tax cases to show that it was reasonable

for them to have relied on re-enactment of the expired statute without change.

Even if the J51 statute were like retroactive gift tax case legislation, this still would not make it unconstitutional. See, e.g., Milliken v. United States, 283 U.S. 15 (1931), which upheld a retroactive gift tax. "The broader focus is upon whether the taxpayer's 'reliance' has been justified under all the circumstances of the case and whether his 'expectations as to taxation [have been] unreasonably disappointed.' " Neuner, 63 AD2d at 300, 408 NYS2d at 96 (emphasis in original) (quoting Wilgard Realty Co., Inc. v. Commissioner of Internal Revenue, 127 F.2d at 517). Also cited in Neuner is Matter of Chrysler Properties v. Morris, 23 NY2d 515, 521, 245 NE2d 395, 398, 297 NYS2d 723, 727 (1969), which indicates that at some point the reliance factor becomes the predominant element.

Here, not only do the facts fail to show reasonable reliance but, also, the law is well settled that there is no vested right in existing legislation or rules of law to preclude their change or repeal. I.L.F.Y. Co. v. Temporary State Housing Rent Commission, 10 NY2d 263, 270, 176 NE2d 822, 826, 219 NYS2d 249, 254 (1961), appeal dismissed, 369 U.S. 795 (1962); Matter of West, 289 N.Y. 423, 431, 46 NE2d 501, 505 (1943), aff'd sub nom. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36 (1944); Preston Co. v. Funkhouser, 261 N.Y. 140, 144, 184 N.E. 737, 739, aff'd, 290 U.S. 163 (1933).

Even more particularly, there is no vested right in statutory privileges and exemptions. Gattis v. Gravett, 806 F.2d 778 (8th Cir. 1987); Brearley School, Limited v. Ward, 201 N.Y. 358, 94 N.E. 1001 (1911); Bronx Garment Center v. City of

New York, 199 Misc. 513, 106 NYS2d 720 (Sup. Ct., Bronx Co., 1951), aff'd, 279 App. Div. 1048, 113 NYS2d 257, leave to appeal denied, 280 App. Div. 890, 115 NYS2d 524 (1st Dept., 1952). In Adelman v. Adelman, 58 Misc 2d 803, 806, 296 NYS2d 999, 1004 (Sup. Ct., Queens Co., 1969), the court explained that a right is not vested unless it is something more than a mere expectation based upon an anticipated continuation of the general law.

In Matter of Grossman v. Wagner, 20 Misc 2d 707, 712, 192 NYS2d 557, 563 (Sup. Ct., N.Y. Co., 1959), concerning a new subdivision added to the J51 law eliminating benefits for certain projects, the court opined:

> It is well settled that statutes granting tax exemption and similar statutes are, in the absence of a contract to continue the exemptions or other privileges granted, revocable at the will of the Legislature, and this is so notwithstanding the fact that persons

may have performed acts or expended money in reliance upon the statutes prior to their repeal or modification. The rule is stated as follows in Cooley's authoritative Law of Taxation (4th ed., Vol. 2), in section 701: "If the grant of an exemption does not constitute a contract it is revocable by the power which made the grant. It is perfectly well settled that an exemption granted from motives of state policy merely, and where the state and the citizen do not meet on a basis of bargain and consideration, is to be deemed expressive only of the present will of the state on the subject; and the law granting it, like laws in general, is subject to modification or repeal in the legislative discretion, and it is immaterial that while it continued in force persons have acted in reliance upon it. * * * a state may, at its pleasure, withdraw an exemption which is a mere gratuity possessing no element of a contract, even though the corporation may have incurred expense on the faith thereof." (Citing in n. Grand Lodge F. & A. Masons of Louisiana v. City of New Orleans, 166 U.S. 143; emphasis mine.) The cases supporting[4] the language of the text are legion.

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[4] This position was adopted by the court at a later stage of the Grossman case in

(Footnote Continued)

In light of the facts and the law, appellants could not and should not have relied on re-enactment of the enabling legislation with all the benefits formerly provided. The fact that the enabling statute was allowed to expire, although the local law remained in effect for a slightly longer term, was alone a definite warning that J51 benefits were being subjected to review and open to change in the enactment of any new enabling statute. See "J-51's Uncertain Future Slows Major Renovations", New York Law Journal 11/17/82, p. 35. This was noted by the Court of Appeals as follows:

> [W]e are persuaded that petitioner could not have justifiably relied on the tax inducement as it existed in

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(Footnote Continued)
dismissing the challenges to the J51 amendment. Matter of London v. Wagner, 22 Misc 2d 360, 363-64, 195 NYS2d 550, 555 (Sup. Ct., N.Y. Co., 1959), aff'd, 13 AD2d 479, 214 NYS2d 647 (1st Dept., 1961), aff'd, 11 NY2d 762, 181 NE2d 759, 227 NYS2d 13 (1962).

> 1982. New York City's J-51 program -- although extended by local law to 1984 -- was subject to such changes as may have been made in the State enabling legislation itself, which authorized the tax exemption in the first instance. Petitioner was forewarned that the state authorization expired on June 1, 1982, thereby calling into question the continued validity of the local law after that date. With such notice, petitioner may not now claim he entertained a settled reasonable expectation of entitlement to the City's exemption based upon renovation he did not commence until April 1983.

70 NY2d at 457, 517 NE2d at 203, 522 NYS2d at 488 (JS-A-6).

Moreover, both under the old as well as the new statute, benefits do not come into being until HPD determines that all conditions of the J51 program are met. The record leaves no doubt that appellants were well aware that, under the program, benefits did not vest upon commencement, but only after the project was completed and application was made to HPD for a determination of eligibility. Thus, even if

the statute had been re-enacted without any change, there was still no assurance, certainly no guaranty, that appellants would receive benefits and, if so, to what extent.

The J51 program, like other legislated tax exemptions, confers no vested rights. For appellants to contend that they were induced to buy SRO's for conversion to cooperatives in reliance on the same exemptions being granted without regard to currently revealed public needs is manifestly unreasonable and in no way impugns the constitutionality of legislative changes made to meet those needs.[5]

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[5] Contrary to appellants' assertion on pages 6 and 8 of their Jurisdictional Statement, there is no conflict between the decision below and LeCroy Research Systems Corporation v. Commissioner of Internal Revenue, 751 F.2d 123 (2d Cir., 1984). In LeCroy, the Internal Revenue Service was estopped from retroactively applying a regulation where specific prior assurances

(Footnote Continued)

(2)

As to the second standard (supra, p. 15), there is no strength to appellants' claim to benefits. As demonstrated above, appellants had no legal right to rely on benefits remaining unchanged (supra, pp. 21-23) and the facts do not support any such reliance (supra, pp. 24-26). Thus, there is no vested right and no valid claim to the exemption.

(3)

Coming to the third standard (supra, p. 15), there can be no doubt about the public purpose served by the limited retroactivity at issue in this case. As stated by the Court of Appeals: "The objectives of the retroactive application - to forestall the loss of SRO housing and to discourage the precipitous eviction of tenants

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(Footnote Continued)
had been given that the regulation would only be prospective.

- are valid public purposes." 70 NY2d at 457, 517 NE2d at 203, 522 NYS2d at 488 (JS-A-5-6).

Accordingly, the retroactivity of the legislation here, where the government had a legitimate concern "that evasive measures taken after introduction of a bill but before enactment might frustrate the purpose of the legislation", was necessary and properly sanctioned. Matter of Neuner, 63 AD2d at 302, 408 NYS2d at 97 (quoting Purvis v. United States, 501 F.2d 311 (9th Cir. 1974), cert. denied, 420 U.S. 947 (1975)).

(4)

Finally, the period of retroactivity meets the fourth standard of being justifiable (supra, p. 15). "Retroactivity in taxation which would otherwise be so arbitrary as to be unconstitutional may escape such disability if it is not too great in point of time." Wilgard Realty Co., Inc. v.

Commissioner of Internal Revenue, 127 F.2d at 517, cert. denied, 317 U.S. 655 (five years retroactivity upheld). The Court of Appeals here observed that appellants, themselves, conceded that the period of retroactivity is not excessive (JS-A-5).

In sum, the decision of the Court of Appeals correctly evaluated the facts and applied the governing law. There is no merit in appellants' attempt to obtain further judicial review.

CONCLUSION

The appeal should be dismissed or, alternatively, the judgment appealed from should be affirmed.

March 2, 1988

Respectfully submitted,

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APPENDIX

Statutory Provisions

New York Real Property Tax Law §489[1] provides in part:

> 1.(a) Any city to which the multiple dwelling law is applicable, acting through its local legislative body or other governing agency, is hereby authorized and empowered, to and including June first, nineteen hundred eighty-six, to adopt and amend local laws or ordinances providing that any increase in assessed valuation of real property shall be exempt from taxation for local purposes, as provided herein, to the extent such increase results from:
>
> (1) conversion of buildings or structures on such property to class A multiple dwellings not used in whole or in part for single room occupancy....
>
> * * *

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[1] As amended by L. 1983, c. 401, §6, effective June 30, 1983, retroactive to June 1, 1982. The amendment deleted from subdivision 1(a)(1) a reference to the conversion of "class B multiple dwellings," added subdivision 13, and at §15 of c. 401 stated: "this act shall only apply to conversions, alterations or improvements commenced on or after July first, nineteen hundred eighty-two."

13. Additional limitation. The benefits of this section shall not apply to any conversion of or alteration or improvement to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.

Section 11-243 (formerly §J51-2.5)[2] of the Administrative Code of the City of New York provides in part:

i. The benefits of this section shall not apply:

* * *

(6) to any conversion of or alteration or improvement, commenced on or after July first, nineteen hundred eighty-two, to any class B multiple dwelling or class A multiple dwelling used in whole or in part for single room occupancy, regardless of the status or use of the building after the conversion, alteration or improvement unless such conversion, alteration or improvement is carried out with the

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2 As amended by Local Law No. 56 of 1983, enacted on November 7, 1983, to be effective immediately and to be deemed to have been in full force and effect since June 1, 1982.

substantial assistance of grants, loans or subsidies from any federal, state or local agency or instrumentality.[3]

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[3] According to §11(1) of Local Law No. 56, relating to the law's effective date, "paragraph (6) of subdivision i... shall apply only to conversions, alterations or improvements commenced on or after July first, nineteen hundred eighty-two".

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No. 87-1275

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

REPLAN DEVELOPMENT, INC.
and EDWARD C. RUBIN,
Appellants,

v.

DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK and THE CITY OF NEW YORK,
Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

APPELLANTS' REPLY BRIEF

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March 14, 1988

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APPELLANTS' REPLY BRIEF

Appellants Replan Development, Inc. and Edward C. Rubin ("Appellant") respectfully submit this reply brief in support of the Jurisdictional Statement.

The City devotes most of its brief to disingenuous attempts to avoid the constitutional issue squarely addressed and wrongly decided by the New York Court of Appeals: whether an affirmative tax inducement program, after inducing the desired investment, may be repealed retroactively.

This issue has never been addressed by the Court and is significant in an era when state and local governments increasingly use aggressive tax exemption programs to

promote specific investment. The City's motion to dismiss —which draws upon erroneous formulations used by the court below and certain federal courts of appeals—confirms the importance of this appeal.

1. The City argues that a retroactive repeal of a tax inducement statute implicates none of the constitutional guidelines decided by the Court 50 years ago with respect to gift taxes. *See Welch* v. *Henry,* 305 U.S. 134, 147 (1938). The purported distinction is that the gift tax was a "new tax never before imposed so that it could not have been reasonably anticipated." City Brief at 17. According to the City, a retroactive new tax is "vitally different" from the "retroactive elimination of a pre-existing tax exemption." *Id.* The City cites *Estate of Ekins* v. *IRS,* 797 F.2d 481 (7th Cir. 1986), for the proposition that retroactively "eliminating an exemption" raises no special constitutional issues. City Brief at 18.

The error in the analysis adopted by the Court of Appeals, by the Seventh Circuit and by the City is that the Constitution does not draw a distinction based on the tax device or category (i.e., an exemption *vs.* a levy; a property tax *vs.* gift tax; a new *vs.* an old tax). It is clear, for example, that a new income tax, even though new, could be imposed retroactively, subject only to such broader considerations as the length of the retroactive period.

The lesson of the Court's teachings on retroactivity of taxes, now 50 years old, is that the constitutional issues should hinge, not upon the *category,* but upon the *effect* of the tax change. *Welch* v. *Henry,* 305 U.S. at 147. Thus, within broad guidelines, taxes can be retroactively raised or lowered (whether by new taxes, new levies or removing an exemption), except that any tax change that materially affects the taxpayer's conduct in reliance upon prior law may not be imposed retroactively. *Id.*

This case involves a property tax exemption and abatement program. Based on the fact that property taxes are not new taxes, and on supposition that the development of property involves "some economic benefit from the conduct aside from the tax benefit" (A-4), the Court of Appeals concluded simplistically that no special constitutional problems were implicated. The structure of the J-51 tax inducement program, however, was that the investor was affirmatively induced to undertake the specific investment sought by the legislature—the "conversion of Class B to Class A multiple dwellings"—by the promise of as-of-right tax benefits. The amount of the tax inducement was huge—in this case, almost 40% of the underlying purchase price of the buildings.

It offends the Constitution for a statute to induce behavior and then retroactively repudiate the inducement. The offense does not relate to the flavor of the tax, but to its effect, which is to alter voluntary conduct. The decision below and the analysis of cases such as *Estate of Ekins* v. *IRS* apply an erroneous constitutional standard, and require review by the Court.

2. The City understandably squirms to avoid joining the issue. The City acknowledges that the City's J-51 Program was in effect at the time of Appellant's "commencement" of the renovation, as did the Court of Appeals (A-2, 44). Both nonetheless find satisfaction in asserting, as a justification for the inherent unfairness here, that the reasonableness of Appellant's reliance on the City law is questionable. The purported basis for the charge is that "Appellants were forewarned that changes might be made in the program when the state enabling legislation expired" in June 1982. City Brief at 12. However, it was not the state legislation but the City's own program that promised

the as-of-right inducement based upon City taxes. The record contradicts any suggestion that the City program would be changed retroactively; indeed, the City was actively and publicly encouraging renovations under the program. *See, e.g.*, Jurisdictional Statement at 3, Statement of City Corporation Counsel, July 2, 1982: "It's crystal clear that . . . . the program automatically lasts until October 31, 1984."

The City unfortunately goes beyond the bounds of advocacy in trying to argue that Appellant did not qualify for benefits because Appellant's administrative application certifying the actual costs of the renovation was filed after the change in law. City Brief at 3-4, 25-26. This proposition, which if true might mean there was never an as-of-right entitlement, is contradicted by the decisions below, which acknowledge that the black letter of the tax program provides that "commencement" of the renovation triggers entitlement to the benefits. A-3: "Having commenced the conversion of his two buildings in April 1983, petitioner falls squarely within the retroactive period." *See* A-9-10. The renovation, of course, must then be completed and the application showing costs, etc., has to be filed (by regulation, within 48 months), but the structure of the law requires that, even if the program were repealed entirely, the investor who "commenced" the renovation would be entitled to the promised tax benefits. Here, in fact, the project was substantially completed before the law was changed retroactively.

It is remarkable that the City feels the freedom to argue by stating a legal standard—that "vesting" is a function of filing the application after completion—that it knows is not true.

CONCLUSION

For the reasons stated herein and in our Jurisdictional Statement, the Court should note probable jurisdiction and hear the appeal.

Respectfully submitted,

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